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U.S. Citizenship and Immigration Services

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[redacted]

FILE: LIN 03 198 50886 Office: NEBRASKA SERVICE CENTER Date: NOV 28 2005

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer software services company. It seeks to employ the beneficiary permanently in the United States as a senior software architect pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly. The director further determined that the beneficiary did not meet the educational requirements of the labor certification.

On appeal, counsel submits a brief and additional evidence.

Ability to Pay

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on September 3, 2002. The proffered wage as stated on the Form ETA 750 is $75,500 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established on September 4, 1997, to have a gross annual income of $784,694, net annual income of $52,661 and to currently employ six workers. In support of the petition, the petitioner submitted its 2002 Form 1120S, U.S. income tax return for an S Corporation.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 18, 2004, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide its 2003 federal tax return, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted its 2003 corporate tax return. As the director only contested the petitioner's ability to pay in 2003, we will only examine the documents relating to that year.

The 2003 tax return reflects the following information:

Net income	$38,154
Current Assets	$9,842
Current Liabilities	$37
Net current assets	$9,805

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage beginning in 2003. Thus, the director denied the petition.

On appeal, counsel asserts that the petitioner has a reasonable expectation of an increase in business and increase in profits. Counsel notes that the petitioner's deductions in 2003 include $656,845 in consultant fees, some of which would be saved by hiring the beneficiary. Counsel further notes that the petitioner maintains sufficient credit to cover the proffered wage. The petitioner submits an affidavit from the petitioner's accountant, evidence of contracts for consultants and evidence of the petitioner's credit.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2003.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The petitioner's net income in 2003 was less than the proffered wage. Thus, the petitioner has not demonstrated that its income in 2003 is sufficient to demonstrate the ability to pay the proffered wage.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not,

therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[1] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. In 2003, the petitioner's net current assets were only $9,805. Thus, the net current assets cannot establish the petitioner's ability to pay the proffered wage in 2003.

On appeal, the petitioner relies on consulting fees it paid to contractors. The petitioner submits evidence of contracting the beneficiary in 2004 and a letter from the petitioner's accountant expressing an opinion as to the reasonableness of the assertion that hiring the beneficiary will save consulting fees. While the assertion may be reasonable in the abstract, there is no evidence that the consultants utilized by the petitioner performed the same duties in 2003 as those set forth in the Form ETA 750A. The petitioner has not documented the position and duties of the consultant performing the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

While evidence that the petitioner began contracting the services of the beneficiary in 2004 may be considered towards the petitioner's ability to pay the proffered wage in 2004, it does not establish that funds were available in 2003 to pay the proffered wage.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Required Education

The regulation at 8 C.F.R. § 204.5(k)(2) permits the following substitution for an advanced degree:

> A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

To determine whether a beneficiary is eligible for a second preference immigrant visa, CIS must ascertain whether the alien is, in fact, qualified for the certified job. CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec.

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[1] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

It is important that the ETA-750 be read as a whole. Block 14 on the ETA-750 A contained in the record reflects that a Bachelor's degree in Computer Science is required. Block 15, which permits an employer to list other special requirements, does not indicate that any other major field of study will be accepted. The labor certification does not include the fields of engineering or electronics communications and it does not indicate that an equivalent degree in a related degree would be acceptable.

The beneficiary has a four-year bachelor of engineering in electronics and communication engineering from the University of Madras. The petitioner initially submitted an evaluation from the Trustforte Corporation concluding that the beneficiary's degree from the University of Madras is equivalent to a Bachelor of Science degree in Electronic Engineering from an accredited institution of higher learning in the United States. The evaluation continues:

> Further, it is significant that the academic study of Electronic Engineering is closely related to the area of Computer Science and Computer Engineering. Indeed, the field of Electronic Engineering serves as the fundamental academic underpinning for the study of Computer Science. These fields include many of the same concepts and academic principles. Many courses completed in the discipline of Electronic Engineering includes [sic] the use of computers and involve the study of principles of computer science. Further, the study of Electronic Engineering involves concepts of Computer Science, Engineering and Mathematics. Most curricula in the fields of Electronic Engineering include several courses in Computer Science and Computer Engineering.

But the evaluation stops short of finding that the beneficiary's degree from the University of Madras is a foreign equivalent degree to a U.S. baccalaureate in Computer Science.

In response to the director's request for additional evidence, the petitioner submitted a new evaluation from Morningside Evaluations and Consulting evaluating the beneficiary's degree from the University of Madras and a professional diploma from NIIT. The diploma itself is not in the record. The beneficiary did not list this diploma on the Form ETA-750B signed under penalty of perjury. The regulation at 8 C.F.R. § 204.5(k)(3) requires an official academic record as evidence of a degree. An evaluation attesting to a degree does not constitute an official academic record.

The evaluation concludes:

> On the basis of the credibility of the University of Madras, NIIT, the number of years of coursework, the nature of the coursework, the grades earned in the coursework, and the hours of academic coursework, it is the judgment of Morningside Evaluations and Consulting that [the beneficiary] has attained the equivalent of a Bachelor of Science degree in Computer Science from an accredited institution of higher education in the United States.

In addition, counsel asserts that the inclusion of only Computer Science as the field of study was a "scriveners error." The petitioner submits job postings by the petitioner and the company's prevailing wage request all including electronics and communications as an acceptable field of study.

The director concluded that the labor certification did not permit a degree in a related field and, thus, the beneficiary does not meet the requirements of the labor certification.

On appeal, counsel distinguishes the cases cited by the director and cites letters and memoranda for the proposition that an equivalent foreign degree is acceptable. Counsel further notes that the court in *Chintakuntla v. INS,* No. C99-5211 MMC (N.D.Cal. 2000), found that the labor certification must be read as a whole. Counsel notes that the labor certification does not require any specific number of years of college; thus, a four-year bachelor's degree is not required and CIS should accept the beneficiary's combination of degrees as equivalent to the degree listed on the labor certification.

First, a United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). If it is counsel's position that the labor certification does not require a four-year bachelor's degree, than the job does not require an advanced degree professional.[2]

Regardless, the issue is not whether the beneficiary has a degree that is equivalent to a U.S. baccalaureate degree but, rather, whether he has a degree in the requisite field. We are bound by the terms of the labor certification as certified by the Department of Labor. The labor certification is unambiguous that the job requires a degree in a specific field and only that field. The petitioner has not established, through the submission of official academic records, that the beneficiary has any other degree than his degree from the University of Madras. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.,* 19 I&N Dec. 817 (Comm. 1988). That said, no evaluation has found the beneficiary's degree from the University of Madras to be equivalent to a U.S. baccalaureate *in Computer Science.*

Even if the petitioner had established that he had received the diploma from NIIT, we will not accept a combination of degrees as a foreign equivalent degree. Whether the equivalency of a bachelor's degree is

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[2] After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, legacy INS specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added). There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act with anything less than a full baccalaureate degree.

based on work experience alone or on a combination of multiple lesser degrees, the analysis results in the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree." As discussed above in footnote 2, in order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

For the reasons discussed above, we concur with the director that the beneficiary does not meet the educational requirements set forth on the labor certification.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.